85-1606

No.

Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

October Term, 1985

WHALERS' VILLAGE CLUB,
Appellant,

VS.

CALIFORNIA COASTAL COMMISSION,
Appellees.

On Appeal from the Supreme Court of California

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

The homeowners of Whalers' Village ("Homeowners") faced destruction of their beachfront homes by storm waves. They saved their homes by placing rocks directly under and adjacent to them to break the force of the waves. The California Coastal Commission refused to grant them a permit for the rocks unless the Homeowners, without compensation, first offered to grant the general public an easement to cross and make recreational use of their entire private beach, the functional yards of the homes. The Federal Constitutional issue in the case is:

1. Can the California Coastal Commission require Homeowners to surrender the right of exclusive possession of their property as a condition to granting a permit for a protective rock revetment without violating the Homeowners' Fifth and Fourteenth Amendment guarantees against taking private property for public use without payment of just compensation.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Supreme Court of the State of California.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	i
JURISDICTIONAL STATEMENT	1
OPINIONS BELOW: PROCEDURAL HISTORY	1
GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	4
STATEMENT OF FACTS	5
RAISING THE FEDERAL QUESTION	9
THE QUESTION PRESENTED IS SUBSTANTIAL: CALIFORNIA IGNORES THE MANDATE OF THIS COURT	9
A. This Court Has Determined That Government Action Requiring A Landowner To Surrender The Right Of Exclusive Possession Violates The Landowner's Fifth And Fourteenth Amendment Guarantee That Private Property Not Be Taken For Public Use Without Payment Of Just Compensation	9
B. The Court of Appeal Opinion Creates A Broad Exception To This Court's Rules, Holding That Where The Landowner "Triggers" The Governmental Action By Requesting A Permit, Government May Take The Landowner's Right To Exclusive Possession Without Payment Of Just Compensation	11
C. The California Exception Directly Conflicts With The Decisions Of This Court In Kaiser Aetna and Loretto	11

TABLE OF CONTENTS

	Page
D. The California Exception Directly Conflicts With The Ninth Circuit View	12
E. The California Exception Has Implications Broader Than Land Use Regulation	13
F. The Court Of Appeal Incorrectly Ruled That A Landowner Must Lose All Economic Use Of Property Before The Loss Of Exclusive Possession Constitutes A "Taking"	14
G. In Both Kaiser Aetna And This Case Government Created Reasonable Economic Expectancies That The Landowner Would Have A Right To Exclusive Possession Of Property	15
H. The Homeowners' Loss Of Exclusive Possession In This Case Is Far More Serious Than Occurred In Loretto Or Kaiser Aetna; The Homeowners Will Lose Their Right Of Privacy	16
I. California Incorrectly Seeks To Substitute Its "Rational Relationship" Rule For The Rules Laid Down By This Court	17
J. California's Refusal To Allow A Landowner Meaningful Access To Its Courts To Determine Whether Fifth And Fourteenth Amendments Rights Have Been Abridged In Itself Violates Those Rights	19
CONCLUSION	22

INDEX TO APPENDICES

APPENDIX A

Page

Opinion of the Court of Appeal A-1

APPENDIX B

Notice of Order Denying Review, California Supreme Court B-1

APPENDIX C

Notice of Appeal to the Supreme Court of the United States C-1

TABLE OF AUTHORITIES CITED

Cases

Page

Agins v. City of Tiburon, 24 Cal.3d 266, 598 P.2d 25, 157 Cal.Rptr. 372 (1979), *aff'd* 447 U.S. 255 (1980) 4, 20

Associated Home Builders, Etc., Inc. v. City of Walnut Creek, 4 Cal.3d 633, 484 P.2d 606, 94 Cal.Rptr. 630 (1971) 17

Ayres v. City Council of Los Angeles, 34 Cal.2d 31, 207 P.2d 1 (1949) 17, 18

Bixby v. Pierno, 4 Cal.3d 130, 481 P.2d 242, 93 Cal.Rptr. 234 (1971) 21

City of San Diego v. California Coastal Commission, 119 Cal.App.3d 228, 174 Cal.Rptr. 5 (1981) 20

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) 2

County of Imperial v. McDougal, 19 Cal.3d 505, 564 P.2d 14, 138 Cal.Rptr. 472 (1977) 6

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) 4

Grupe v. California Coastal Commission, 166 Cal.App.3d 148, 212 Cal.Rptr. 578 (1985) 18

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 3, 4, 10, 11, 12, 14, 15, 16

Liberty v. California Coastal Commission, 113 Cal.App.3d 491, 170 Cal.Rptr. 247 (1980) 18

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 3, 4, 10, 11, 12, 13, 14, 15, 16

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 4

Noranda Exploration, Inc. v. Ostrom, 113 Wis.2d 612, 335 N.W.2d 596 (1983) 13, 14

TABLE OF AUTHORITIES

CASES

Page

Oliver v. United States, 466 U.S. 170 (1984) 17

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 3, 4, 9, 10, 12

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 4

Remmenga v. California Coastal Commission, 163 Cal.App.3d 623, 209 Cal.Rptr. 628 (1985), *Appeal Dismissed*, ____ U.S. ____, 106 S.Ct. 241, 88 L.Ed.2d 250 (1985), reh'g. denied, ____ U.S. ____, 106 S.Ct. 548, 88 L.Ed.2d 566 (1985) 18

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 4

Sea Ranch Association v. California Coastal Commission, 527 F.Supp. 390 (N.D.Cal. 1981) *vacated and remanded*, 454 U.S. 1070 (1981), *(on remand)* 552 F.Supp. 241 (N.D.Cal. 1982) 19

Sederquist v. City of Tiburon, 765 F.2d 756 (9th Cir. 1984) 12

Strumsky v. San Diego County Employees Retirement Assn., 11 Cal.3d 28, 520 P.2d 29, 112 Cal.Rptr. 805 (1974) 21

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 4

Constitution

United States Constitution, Fourth Amendment ... 16

United States Constitution, Fifth Amendment ..... i, 2, 4, 9, 11, 14, 17, 19, 20, 21

United States Constitution, Fourteenth Amendment ..... i, 2, 4, 9, 17, 19, 20, 21

TABLE OF AUTHORITIES

Page

Statutes

California Code of Civil Procedure, Sec. 1094.5 (West 1982) 8

California Public Resources Code, Secs. 30000 et seq. (West 1977) 2

California Public Resources Code, Sec. 30801 (West 1977) 8

United States Code, Title 28, Sec. 1257(2) 2

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On Appeal from the Supreme Court of California

JURISDICTIONAL STATEMENT

OPINIONS BELCW: PROCEDURAL HISTORY

On October 11, 1984, the California Coastal Commission ("Commission") appealed to the California Court of Appeal, Second Appellate District, from a judgment of the Ventura County Superior Court in favor of Whalers' Village Club, Appellant ("Homeowners"), in two consolidated actions: the first instituted by petition for writ of mandamus filed October 19, 1981 by Homeowners ("the mandate action"); the second instituted by complaint for injunctive relief, civil fines and penalties, and exemplary damages filed December 4, 1981 by the Commission ("civil fines and penalties action"). The court of appeal filed its opinion reversing the pertinent portion of the trial court judgment on October 11, 1985. The Opinion is attached as Appendix A.

Homeowners petitioned for review before the Supreme Court of California. The Petition was denied December 31, 1985 (Appendix B) at which point the proceedings in the mandamus action clearly became final in the California State courts. Proceedings in the civil fines and penalties case also became final on that date within the meaning of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-81, 485 (1975).

A Notice of Appeal to this Court was filed with the California Court of Appeal (which retains possession of the record in this case) on March 24, 1986 (Appendix C). The appeal is timely in this Court.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked by 28 U.S.C. § 1257(2).

The California Coastal Commission imposed a regulatory permit condition requiring Homeowners to irrevocably offer to dedicate an easement for public passage and sit-down recreational use ("public access and use condition") applicable to real property owned by Homeowners. The condition requires Homeowners, without compensation, to give up their right to exclusive possession of their property and permit permanent physical occupation by others of the beach-yard immediately adjacent to the beachfront homes. Homeowners contend the condition constitutes a "taking" without just compensation prohibited by the Fifth and Fourteenth Amendments of the United States Constitution. The Commission accomplished the "taking" by construing the California Coastal Act (Cal. Pub. Res. Code §§ 30000 et seq. (West 1977)) to require the imposition of the public access and use condition on a permit for placement of a rock revetment underneath and adjacent to beachfront homes to protect

those homes from destruction by unusually severe storm conditions.

Before trial, both parties fully briefed relevant decisions of this Court, including *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). In the mandate action, the trial court held that imposition of the public access and use condition constituted a taking of private property for public use without justification or payment of just compensation (III CT 660). The trial court gave judgment for Homeowners and granted the writ of mandate ordering issuance of the permit without the public access and use condition and other conditions not at issue here (III CT 686-88, 683-84). In the civil fines and penalties action, the trial court gave judgment for Homeowners for the same reasons supporting its ruling in the mandate action (III CT 661) — in effect holding that since the extraction of the conditions was constitutionally impermissible, Homeowners had not violated the California Coastal Act by placing the protective rocks.

The Court of Appeal, Second Appellate District: (1) reversed to allow reissuance of the permit with the public access and use condition; (2) affirmed and reversed in part as to other conditions originally challenged by Homeowners, not at issue here; and (3) remanded the action for civil fines and penalties and injunctive relief for determination in light of its opinion. (CA 22-24.)[1] By its

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[1]The court of appeal, having approved the public access and use condition and having found Homeowners in violation of certain Coastal Act provisions has ordered a remand to the trial court for limited purposes on an issue framed in the Opinion (CA 37). If the judgment of the court of appeal is permitted to stand unchanged, and if the trial court finds for the Commission on the state court issue

order denying review, the California Supreme Court left intact the conclusions of the court of appeal.

Cases sustaining this Court's jurisdiction on appeal to review state court judgments concerning regulatory takings of private property without just compensation are: *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

> "[N]or shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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framed by the court of appeal, Homeowners face an array of possible state law penalties ranging from substantial monetary fines to an order to *remove* the protective revetment.

STATEMENT OF FACTS

The 29 single-family homes in Whalers' Village were constructed before adoption of the Coastal Act of 1972. The beach then extended well over 100 feet seaward of the 17 ocean-front residences. Wave action, even during winter storms, never came within more than 15 to 20 feet of the houses. (AR 395; I CT 201.)

In March 1978, massive storms, occurring over approximately ten days, consumed the beach beyond the caissons supporting the homes all the way to the homes' foundation wall, severely threatening all 17 beachfront homes. Emergency steps were taken to protect the foundation wall and its footings were strengthened. However, Homeowners were told that a revetment in front of the caissons would be necessary to break the force of the waves and to trap any future buildup of sand behind the revetment, thereby protecting the caissons and the foundations from future storms. (AR 395-400; I CT 201-02.)

Shortly thereafter, Homeowners applied for a permit from the then-existing Regional Coastal Commission to construct a permanent protective rock revetment immediately under and in front of their homes to avoid destruction caused by unusual sea conditions resulting from major storms. The proposed revetment was designed to lie buried under the existing sand beach in its normal state but to protect the homes from destruction when severe storm conditions produced severe beach erosion, uncovering the rock revetment. (AR 397, 26-29.)

Commission staff recommended granting the permit, conditioned by requiring Homeowners to dedicate an irrevocable offer to grant an easement for public use of the beach portions of the Homeowners' property. (AR 128; II CT 276, 286-87.) Because Homeowners did not believe the Commission properly could require them to

convey away their right to exclusive use of their property as the price of saving their homes, the permit application was withdrawn. (I CT 202.) The Executive Director of the Regional Commission informed Homeowners that having withdrawn the application, it would be "very difficult" to obtain an emergency permit to place the revetment regardless of the urgency and such a permit, if issued, would have an easement condition. (AR 51, 129, 445.)

In February 1980, similar storms battered and almost entirely exposed the unprotected caissons. One home suffered substantial damage when the caissons sank approximately 12 inches and the first floor slab cracked at a point over the foundation wall. Other homes experienced some caisson deflection. Immediate action was required to prevent worse damage. At the storm's height, five-to-seven-ton boulders were placed immediately in front of and underneath the 17 oceanfront homes to deflect the force of the storm.[2] As the storm abated, additional large and man-size (50-150 lbs.) boulders were more precisely placed behind the very large rocks. Homeowners' civil and structural engineers concluded that the rock revetment is "absolutely imperative to prevent severe damage to the structures during future storms of equal or greater magnitude."[3] (AR 426, 402, 422-28; I CT 202.) Over the next year the revetment demonstrated it can do what it was designed to do: trap sand behind the revetment around

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[2]California Law in 1980 provided that if an emergency permit containing an access and use condition had been obtained from the Commission, acceptance of the benefits of the permit would have precluded Homeowners from contesting the validity of the condition. *County of Imperial v. McDougal*, 19 Cal.3d 505, 510-11, 564 P.2d 14, 138 Cal.Rptr. 472 (1977).

[3]The Coastal Commission admits that the revetment is intended to *protect life and property in a hazardous area.* (AR 130; II CT 278, 290.)

the caissons to ensure the friction-bearing design can be accomplished. During summer 1980, approximately five to six feet of sand brought back by wave action covered the rock revetment and deposited sand underneath the residences. (AR 402, 408.)

In March 1981, high tides and storms again occurred. Newspaper articles referred to these as the worst in many years. The revetment performed well. However, the design engineer had pointed out such storms would demonstrate the requirement for continuing preventive maintenance. In fact, these storms did indicate certain points of weakness, and additional rock, ranging from man-size boulders to quarry run, was placed in the revetment to ensure sand would not wash through the revetment back to sea. (AR 408.)

The Commission informed the Homeowners that placing the protective rock revetment without having first obtained a Coastal permit constituted a violation of the Coastal Act. The Commission told Homeowners that, in accordance with standard Commission policy, Homeowners had the choice of removing their protective device or applying for a permit from the Commission. Homeowners applied for a permit. (AR 412, I CT 202.)

The permit application was again approved with a number of conditions. The condition which is the subject of this appeal reads:

1. *Lateral Public Access*

a) Prior to the issuance of the permit, the Executive Director shall certify in writing that the following condition has been satisfied. The applicant shall execute and record a document, in a form and content approved in writing by the Executive Director of the Commission irrevocably offering to dedicate to a public agency or private association approved by the

Executive Director, an easement for public access and passive recreational use along the shoreline. The document shall also restrict the applicant from interfering with present use by the public of the areas subject to the easement prior to acceptance of the offer. Such easement shall be for the entire width of the property, extending seaward from the toe of the revetment to the mean high tideline. Such easement shall be recorded free of prior liens except tax liens and free of prior encumbrances which the Executive Director determines may affect the interest being conveyed.

The offer shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner. The offer of dedication shall be irrevocable for a period of 21 years, such period running from the date of recording.

b) Prior to the issuance of the permit, the applicant shall submit to the Executive Director evidence that the wire fence and sign located on the Whaler's Village upcoast property line has been removed to the toe of the revetment (remove all posts, mesh and sign seaward of the most landward wooden post). (AR 140.)

As required by state law (Cal. Pub. Res. Code § 30801 (West 1977) and Cal. Civ. Proc. Code § 1094.5 (West 1982)), Homeowners timely filed the writ action challenging these conditions. (I CT 1.)

Shortly thereafter the Commission filed the fines and penalties action seeking civil fines, civil penalties, exemplary damages, and injunctive relief under the Coastal Act. (I CT 14; II CT 464.) The injunctive relief sought was in the alternative: either an order that Homeowners

obtain the permit as conditioned or remove the revetment. As affirmative defenses Homeowners raised the unconstitutionality of the permit conditions. (I CT 8, II CT 471-472.)

RAISING THE FEDERAL QUESTION

In the administrative process before the Commission, Homeowners first raised the issue of government's acquisition of private property for public use without payment of just compensation in the guise of a permit condition (AR 92). The First Amended Petition for Writ of Mandamus alleged the Federal Constitutional issues here presented. It charged that the effect and result of the imposition of the permit conditions, including the public access and use condition, under the aegis of the Coastal Act, was an uncompensated taking of Homeowners' property "in violation of Article 1, Section 19 of the California Constitution, and the Fifth Amendment of the Federal Constitution." (II CT 471-72.) This same Federal Constitutional question was presented at all stages of the appeal.

THE QUESTION PRESENTED IS SUBSTANTIAL; CALIFORNIA IGNORES THE MANDATE OF THIS COURT

A. This Court Has Determined That Government Action Requiring A Landowner To Surrender The Right Of Exclusive Possession Violates The Landowner's Fifth And Fourteenth Amendment Guarantee That Private Property Not Be Taken For Public Use Without Payment Of Just Compensation.

Constitutional standards defining what constitutes a "taking" without just compensation prohibited by the Fifth and Fourteenth Amendments are found in three of

this Court's recent cases: *Penn Central Transportation Co. v. City of New York* 438 U.S. 104 (1978), *Kaiser Aetna v. United States* 444 U.S. 164 (1979), and *Loretto v., Teleprompter Manhattan CATV Corp.* 458 U.S. 419 (1982).

Summarized, the thrust of these cases is as follows:

1. While the line of demarcation between permissible regulation and unconstitutional taking must be decided on the facts of each case (*Penn Central*, 438 U.S. at 123-24), the following factors have particular significance:

The economic impact on the claimant and particularly the extent to which the regulation has interfered with distinct investment-backed expectations.

The "character" of the government action, ranging from a general regulatory program adjusting the benefits and burdens of economic life to promote the common good to a physical invasion of property (*Id.* at 124-28).

2. The right to exclude others is a fundamental element of the property right falling within the category of interests the government cannot take without compensation; an easement requiring physical invasion gives rise to payment of just compensation (*Kaiser Aetna*, 444 U.S. at 179-80).

3. Consent of government officials can lead to justified fruition of a landowner's right to exclude (*Id.* at 179).

4. Actual physical invasion is a governmental intrusion of an unusually serious character. Where there is a permanent invasion there is no need to weigh the extent to which government has interfered with the landowner's reasonable investment-backed

expectations because the "character" of the government action is a per se violation of the Fifth Amendment (*Loretto*, 458 U.S. at 437).

B. The Court of Appeal Decision Creates A Broad Exception To This Court's Rules, Holding That Where The Landowner "Triggers" The Governmental Action By Requesting A Permit, Government May Take The Landowner's Right To Exclusive Possession Without Payment Of Just Compensation.

California has grafted a broad exception to the above rules. The court of appeal held that the principles of *Kaiser Aetna* and *Loretto* do not apply where the landowner takes an action that triggers the police power of the State. (CA at 14-15.) The court ruled that because the Coastal Commission was granted police power authority in the Coastal Act to require of the Homeowners a permit to place rocks within the coastal zone and because the Coastal Act requires public access as a conditon to the permit, the Commission's action did not constitute a "taking." (CA at 14-15.) In other words, if government has police power authority to require a permit, the conditions imposed upon the permit are not subject to the *Kaiser Aetna* and *Loretto* principles.

Since California's burgeoning land use laws require a landowner to obtain permits before doing virtually any act to the property, the California exception threatens to overwhelm this Court's "taking" standards.

C. The California Exception Directly Conflicts With The Decisions Of This Court In Kaiser Aetna and Loretto.

The court of appeal decision is contrary to the facts and reasoning of this Court in *Kaiser Aetna* and *Loretto*. In *Kaiser Aetna* the landowner was required to obtain au-

thorization from the Corps of Engineers for future construction, excavation or filling in the marina (444 U.S. at 168). This Court rejected an argument similar to that relied on by the court of appeal in this case. This Court stated the government had expansive authority under the Commerce Clause to assure the public a free right of access to the marina, but "[w]hether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question." (*Id.* at 174.) Similarly, in *Loretto* the Court found no reason to question the valid police power purpose of the regulation but said, "[i]t is a separate question . . . whether an otherwise valid regulation so frustrates property rights that compensation must be paid." *Loretto,* 458 U.S. at 425.

D. The California Exception Directly Conflicts With The Ninth Circuit View.

The California exception appears to be in direct conflict with the Ninth Circuit Court of Appeals decision in *Sederquist v. City of Tiburon,* 765 F.2d 756 (9th Cir. 1984). In *Sederquist* a landowner had long sought a permit to construct a home on his property. The city refused the permit until he improved an access road over which he did not have exclusive control. The Ninth Circuit reversed a district court summary judgment that the city was not liable in inverse condemnation stating, "the crucial factors to be considered are the economic impact of the regulation, particularly the extent to which it interferes with a landowner's investment backed expectation, and the character of the government's action." *Sederquist,* 765 F.2d at 761 (citing *Loretto,* 458 U.S. 419, 432 and *Penn Central,* 438 U.S. 104, 124).

Thus the Ninth Circuit applied this Court's normal taking analysis where the landowner "triggered" the state's police power by requesting a permit.

E. The California Exception Has Implications Broader Than Land Use Regulation.

In *Noranda Exploration, Inc. v. Ostrom*, 113 Wis.2d 612, 335 N.W.2d 596 (1983) the Wisconsin Supreme Court voided a state statute adding a public utility commission licensing requirement for mineral exploration. The new requirement compelled the licensees to disclose proprietary data and furnish material samples to the utility commission. Acknowledging that the licensing requirement was well within the police power of the state, the court determined that the disclosure condition required a permanent occupation of property in the *Loretto* sense. The court said:

> In Noranda's situation, as in *Loretto*, a "taking" does not become a noncompensable exercise of police power simply because the state allows the owner to make some "reasonable" use of that property. We believe that the character of the governmental activity is the controlling factor here; [this regulation] authorizes a government intrusion of a serious character. In *Loretto*, the Supreme Court did not dispute the lower court's determination that the statute served a legitimate public purpose and was within the state's police power. However, the Court stated that it was:
>
> > " 'a separate question . . . whether an otherwise valid regulation so frustrates property rights that the compensation must be paid.' " 102 S.Ct. at 3170-71.
>
> Under the court of appeals' rationale, almost any infringement upon private property rights would be upheld so long as there existed any possible reasonable relationship between the governmental activity and a patently permissible legislative goal. *This, we*

believe, is an unduly expansive interpretation of the state's police power."

Noranda, supra, 335 N.W. 2d at 605 (emphasis added).

Government today has the power to and does require a permit for nearly all forms of human conduct. If the police power to permit carries with it the right to abridge the right of exclusive possession of property, there is little left of the Fifth Amendment guarantee against the taking of private property for public use without payment of just compensation.

F. The Court Of Appeal Incorrectly Ruled That A Landowner Must Lose All Economic Use Of Property Before The Loss Of Exclusive Possession Constitutes A "Taking".

The California court incorrectly applied the "diminution in value" test to determine whether a taking occurred in the context of this case. The court stated, "While property values in Whalers' Village may not be as high without a private beach, it cannot be said that by offering to dedicate a public access easement, the Homeowners lose all reasonable use of their property and therefore all economic use." (CA 15.)

This Court has used such a test in cases where the question is whether regulation diminishes the landowner's ability to make his own use of his own land. *Kaiser Aetna* and *Loretto*, however, apply different tests when the regulation requires the landowner to surrender the right of exclusive possession and allow third party adverse use of the land.

> [A]n owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property.... [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. [Citation omitted.] Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.
>
> *Loretto*, 458 U.S. at 436 (emphasis in original).

G. In Both Kaiser Aetna And This Case Government Created Reasonable Economic Expectancies That The Landowner Would Have A Right To Exclusive Possession Of Property.

The California Court of Appeal does make one attempt to distinguish *Kaiser Aetna* factually from this case. It states Kaiser Aetna obtained prior governmental approval to remove the shelf between the sea and Kaiser Aetna's freshwater pond without having been required to give public access. This created economic expectancies in the landowner that the pond would remain private. In the Whalers' Village case, says the court, government had not created such expectancies because it had never approved the rock revetment (CA 14-15).

The court of appeal analysis is incorrect. In *Kaiser Aetna* government created reasonable economic expectancies in the landowner that it would have a private lagoon by granting permission to remove the shelf between the sea and the lagoon without requiring public access. Ten years later, the landowner needed Section 403 Corps of

Engineer permits for future construction, excavation and filling in the lagoon. 444 U.S. at 168. Government then tried to impose a public access condition. In this case, over 15 years ago government created in the Homeowners reasonable economic expectancies that they would have private yards. Government approved subdivision of the property, granted building permits to construct the homes with private yards and ever since has exacted taxes on the property, including the private beach portion. Over 15 years later, the Homeowners seek to save their homes from destruction and government confronts them with a public access and use condition. Based on prior government action, the Homeowners had reasonable economic expectancies that they could enjoy the normal incidents of home ownership without public invasion.

H. The Homeowners' Loss Of Exclusive Possession In This Case Is Far More Serious Than Occurred In Loretto Or Kaiser Aetna; The Homeowners Will Lose Their Right Of Privacy.

In *Loretto* the government sought to require the landowner to allow a small box on the roof of the apartment building. In *Kaiser Aetna* the intrusion was limited to the landowner's foregoing an annual $72.00 per boat use fee. The public intrusion in this case not only lowers the value of the homesite; it also violates the Homeowners' right of privacy.

The right of privacy is so fundamental that it comes within the penumbra of Fourth Amendment protection against unreasonable search and seizure. This Court has held that the right of privacy precludes a warrantless search of the area immediately surrounding a home. "[S]ince the enactment of the Fourth Amendment, [this Court] has stressed the overriding respect for the sanctity of the home that has been embedded in our traditions

since the origin of the Republic." *Oliver v. United States,* 466 U.S. 170, 178 (1984) (citations omitted).

A one-time police search is not nearly as intrusive as allowing the general public at all times to make use of the area immediately surrounding a home. Such a privacy violation should come within a similar penumbra of Fifth and Fourteenth Amendment protection against taking property without payment of just compensation.

The court of appeal states the Homeowners have no right of privacy because they happen to live adjacent to an area owned by the state in public trust. The court, therefore, limited its inquiry to the question of whether the Commission's use and access condition bears a reasonable relationship to a proper legislative goal. (CA 12.)

Why a homeowner who happens to live next to property owned by the state is foreclosed from having the same right of privacy as a homeowner who lives next to privately owned property is not explained by the court and makes no sense.

I. California Incorrectly Seeks To Substitute Its "Rational Relationship" Rule For The Rules Laid Down By This Court.

Not only does California reject the Constitutional standards set forth by this Court, it has long employed a radically different constitutional standard known as the "rational relationship rule." The gist of the rule is that if a landowner asks permission of government to make a beneficial use of his land, which either alone or in combination with other uses directly or indirectly will create a burden on the public, government is entitled constitutionally to "mitigate" that burden by the imposition of permit conditions. *Associated Home Builders, Etc., Inc. v. City of Walnut Creek,* 4 Cal.3d 633, 484 P.2d 606, 94 Cal.Rptr. 630 (1971); *Ayres v. City Council of Los Angeles,* 34 Cal.2d

31, 207 P.2d 1 (1949); *Grupe v. California Coastal Commission,* 166 Cal.App.3d 148, 212 Cal.Rptr. 578 (1985); *Remmenga v. California Coastal Commission,* 163 Cal.App.3d 623, 627, 209 Cal.Rptr. 628 (1985), *Appeal Dismissed,* ____ U.S. ____, 106 S.Ct. 241, 88 L.Ed.2d 250 (1985), reh'g. denied, ____ U.S. ____, 106 S.Ct. 548, 88 L.Ed.2d 566 (1985); *Liberty v. California Coastal Commission,* 113 Cal.App.3d 491, 170 Cal.Rptr. 247 (1980). The basic constitutional vice of the rule is that it focuses exclusively on how the landowners' activities may frustrate the attainment of governmental police power objectives and ignores the question emphasized by this Court of how government's exaction interferes with the landowners' constitutionally protected property rights.

California's rational relationship rule may make some sense when a developer seeks the initial subdivision of property. It makes no sense where the government first creates expectations by approving subdivision for residential purposes, approving the construction of homes with private yards and taxing these Homeowners for years based upon their right of exclusive possession. Government cannot belatedly take way the right of exclusive possession when the Homeowners attempt to save their homes from destruction.

In any case, the California Court of Appeal decision severs the last meaningful sinew of the rational relationship rule — the requirement that the development *proposed by the applicant* must at least contribute to the burden before an access condition may be imposed. The trial court found this particular rock revetment placed no burden on the public. (III C.T. 659-60.) The court of appeal reversed, finding that evidence before the Commission that sea walls in general were creating burdens on the public along California beaches was sufficient to satisfy the rational relationship rule. (CA at 17-20.)

The constitutionality of California's rational relationship rule as applied to Coastal Commission actions imposing public access and use conditions came before this Court by a direct appeal of a three-judge district court decision in the case of *Sea Ranch Association v. California Coastal Commission*, 527 F.Supp. 390 (N.D.Cal. 1981) (three judge court), *vacated and remanded*, 454 U.S. 1070 (1981), *(on remand)* 552 F.Supp. 241 (N.D.Cal. 1982). This Court never completed its review, vacating the district court judgment in favor of the Commission and remanding to the district court on the issue of mootness. Ultimately, the case was held moot.

Despite this Court's vacation of the district court *Sea Ranch* opinion, the court of appeal in this case cites as apropos its reasoning that "the validity of the condition is not destroyed because the development has no *direct* nexus to the condition, the benefit to the public is greater than to the developer, or future needs are taken into consideration." (CA 19.) Thus, although this Court never completed its review of the vacated *Sea Ranch* opinion, the reasoning of that opinion has now become the substantive law of California.

The California rational relationship rule may or may not be appropriate in certain situations. At a minimum the rule requires this Court's review to ascertain when and if it should supplant this Court's mode of analysis.

J. California's Refusal To Allow A Landowner Meaningful Access To Its Courts To Determine Whether Fifth And Fourteenth Amendments Rights Have Been Abridged In Itself Violates Those Rights.

California's evisceration of Fifth and Fourteenth Amendment protections against a landowner's having property "taken" by administrative agency action is amplified by a procedural trap it lays for the landowner.

California does not allow the landowner to prosecute an action for damages in inverse condemnation, for declaratory relief or for any other form of action by which a California court would hear the matter on its merits and exercise its independent judgment to determine whether the regulation is unconstitutional as applied to the landowner. *Agins v. City of Tiburon*, 24 Cal.3d 266, 272-73, 598 P.2d 25, 157 Cal.Rptr. 372, (1979), *aff'd.* 447 U.S. 255 (1980).

The only judicial review California allows the landowner claiming an unconstitutional application of a state statute is a writ of mandate review of the agency's actions. *Agins*, 24 Cal.3d at 273. The trial court, and any appellate court, then is limited to a substantial evidence review, according every presumption in favor of the administrative findings even though, had the court heard the case de novo, it would not have reached the same findings of fact itself. *City of San Diego v. California Coastal Commission,* 119 Cal.App.3d 228, 232, 174 Cal.Rptr. 5 (1981).

The court of appeal decision in this case in effect extends this process so that even though the administrative agency filed an action to impose civil fines, penalties, exemplary damages and injunctive relief, Homeowners were denied the right to the independent judgment of a court on the merits of the defense that the landowner's Fifth and Fourteenth Amendment rights had been violated. (CA at 22-24; I CT 113.) Also under the mandate of *Agins,* the trial court granted summary judgment against the Homeowners' causes of action for declaratory relief and inverse condemnation in the cross-complaint filed in the civil fines and penalties action. (II CT 461-62.)

This Court has noted probable jurisdiction in the case of *McDonald v. Yolo County* (unpub'd opinion of California Court of Appeal, Third Appellate Dist.), appeal dock-

eted, No. 84-2015 (U.S. Oct. 21, 1985) (argued March 26, 1985) which raises the question of whether a landowner has a constitutional right to set forth a cause of action for inverse condemnation where California by regulation denied all economic use of the land. This case raises the related issue of whether a similar remedy is required where the landowner must surrender the right of exclusive possession.

The remedy is significant to any California property owner for two reasons. Inverse condemnation provides the landowner a method for recovering damages. It also provides the only method to obtain the independent review of a California court of the constitutional claim on its merits.

California allows a court to exercise its independent judgment on the merits in a mandate proceeding affecting the petitioner's "vested fundamental rights." *Bixby v. Pierno,* 4 Cal.3d 130, 143, 481 P.2d 242, 93 Cal.Rptr. 234 (1971) and *Strumsky v. San Diego County Employees Retirement Assn.,* 11 Cal.3d 28, 520 P.2d 29, 112 Cal.Rptr. 805 (1974).

In this case the trial court found the Homeowners' right fundamental. It exercised its independent judgment and found the Commission's exaction unconstitutional. (III CT 658-659.)

The court of appeal, however, held the trial court erred by exercising its independent judgment. The Opinion concludes that because the homeowners had no fundamental vested right to a *permit* to construct the rock revetment, the trial court erred by independently scrutinizing the evidence relating to the validity of the access *conditions* appended to the permit. (CA 9-10.)

The court of appeal decision allows government to append any condition it desires to a permit granted

within its police powers and to obtain fines, penalties and exemplary damages against the permittees, without the permittees' having meaningful access to California courts to test the constitutionality of the condition.

California's refusal to allow Homeowners meaningful access to its courts to determine whether the Homeowners' Fifth and Fourteenth Amendment property rights have been abridged is in itself a deprivation of those rights.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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March 28, 1986

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
Second Appellate District
DIVISION SIX
2nd Civil No. B-005654
(Super. Ct. Nos. SP-50494 & 75368)
(Ventura County)
WHALERS' VILLAGE CLUB,
Petitioner, Defendant and Respondent,
VS.
CALIFORNIA COASTAL COMMISSION,
Respondent, Plaintiff and Appellant.
Filed: October 11, 1985 Clay Robbins, Jr., Clerk

The California Coastal Commission (Commission) appeals from a judgment granting a writ of mandamus ordering the Commission: 1) to remove from a new development permit conditions requiring respondent to offer to dedicate a public access easement along the beach fronting its property and cease interference with persons presently using the beach, 2) to unconditionally waive any claim of liability on the part of the Commission or any other public agency for any damage from erosion, and 3) to acknowledge that construction of the revetment may result in ineligibility for public disaster funds or loans for repair, replacement or rehabilitation of the property. The Commission also appeals denial of relief in its action for injunctive relief and civil penalties for violation of the California Coastal Act. (Pub. Resources Code §§ 30000 et seq.)[1] We conclude the Commission could properly impose a condition that respondent offer to dedicate a public access easement. We further conclude that the Commis-

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[1]All statutory references are to the Public Resources Code unless otherwise indicated.

sion could extract a waiver of liability for damage caused by or to the construction for which a permit was issued but that the condition imposed was overly broad. There is insufficient evidence in the record to necessitate acknowledgment of ineligibility for public disaster funds. Accordingly, we affirm the judgment in part and reverse in part and remand to the trial court for a determination of the Commission's action for injunctive relief and civil penalties in light of this opinion.

FACTS

Whaler's Village, respondent, consists of 29 single-family homes built in 1969 and located on Pacific Coast Highway in Ventura County, California. The record indicates that when the homes were built, the beach extended well over 100 feet seaward, and wave action, even during storms, never came within 15 to 20 feet of the structures. Each house had two 12 foot deep friction-bearing caissons seaward and a load-bearing foundation wall 20 feet landward supporting the first floor slab which was poured directly on the sand. The caissons, not designed to support the structure alone, required a minimum of nine feet embedment to support vertical loads.

In March 1978, massive storms washed away large amounts of sand exposing the foundation walls. Homeowners avoided even more extensive damage by placing sandbags seaward of the foundation. They were advised by their consultants that a rock revetment in front of the caissons would help protect their homes from the force of the waves.

In October 1978, Whaler's Village applied to the South Coast Regional Commission (Regional Commission) for a coastal development permit (§ 30600) to construct a rock revetment of boulders and filter blanket on the beach under and in front of 17 of the homes. The Commission

staff recommended granting the permit, conditioned upon the applicant's offer to dedicate an easement for public access from the toe of the revetment seaward to the mean high tide line. The homeowners withdrew their application.

In February 1980, similar violent storms exposed the caissons almost entirely, causing substantial damage to one house when the caissons sank approximately one foot and the first floor slab cracked over the foundation wall. Without applying for a coastal permit, Whaler's Village built a revetment consisting of 5-7 ton boulders with 50-150 pound boulders and gravel fill immediately in front of and beneath the 17 oceanfront homes and extending 3-5 feet above beach level and 6-8 feet into the sand. In February 1981, the Regional Commission notified Whaler's Village that a coastal development permit was necessary for placement of rocks and presence of mechanized construction equipment on the beach, and that failure to obtain a permit constituted a violation of the Coastal Act. In March 1981, following storms and high tides the homeowners placed additional boulders on the revetment. In May 1981, Whaler's Village applied for a permit for their already completed revetment. December 16, 1981, the Commission approved the permit application subject to the following conditions:

> "1. The applicant shall execute and record a document . . . irrevocably offering to dedicate to a public agency or private association approved by the Executive Director, an easement for public access and passive recreational use along the shoreline. The document shall also restrict the applicant from interfering with present use by the public of the areas subject to the easement prior to the acceptance of the offer. Such easement shall be for the entire width of

the property, extending seaward from the toe of the revetment to the mean high tideline . . . .

"2. . . . the applicant shall submit a deed restriction which provides '(a) that the applicant understand that the site is subject to extraordinary hazard from erosion and that the applicant assumes the liability from this hazard; (b) the applicant unconditionally waives any claim of liability on the part of the Commission or any other public agency for any damage from such hazard; and (c) the applicant understands that construction in the face of this known hazard may make them ineligible for public disaster funds or loans for repair, replacement, or rehabilitation of the property in the event of erosion.' "

Whaler's Village filed a Petition for Writ of Mandate challenging the Commission's permit conditions. (§ 30801; Code Civ. Proc., § 1094.5.) The Commission filed a Complaint for Injunctive Relief, Civil Fines, Penalties and Exemplary Damages to enforce provisions of the Coastal Act. Whaler's Village raised illegality and unconstitutionality of the conditions as an affirmative defense. Trial on the two cases was consolidated and the parties stipulated that the administrative record be admitted into evidence for purposes of both proceedings. Answers to interrogatories and requests for admissions as well as engineering reports and testimony on behalf of Whaler's Village were admitted into evidence in the enforcement action only.

After the trial court took the matter under submission, Whaler's Village sought an emergency permit to undertake repair work on the revetment due to summer storms and wave action in August 1983. The Commission issued an emergency permit with the same conditions as those appealed. The parties stipulated that the outcome of the

litigation on the original permit would also be binding on the emergency permit.

December 12, 1983, the trial court issued its Statement of Intended Decision Granting Peremptory Writ of Mandate. The court used the "independent judgment" test, "in that the taking here is of a vested property right, not a regulation of future use of property" and stated that "even using the 'substantial evidence' test, the Court can find no substantial evidence in the record to support the required dedication and waiver conditions." The court found that, although the Coastal Act may require a permit "for repair work such as done by petitioners in that tractors and machinery were required to go upon the beach", the revetment did not constitute a "new development" allowing the right to demand the dedication required; there is no evidence to support a conclusion that the revetment will impede public access in any way different than caused by the homes themselves; there is no evidence to support the Commission's findings that construction of the revetment adversely affected public access to or across the beach; the condition requiring the homeowners to deed "their entire private beach to the State or lose their homes to the sea constitutes an unlawful taking of private property without justification or the payment of just compensation," and the waiver of liability is unsupported by the record. The court entered judgment granting a peremptory writ, commanded the Commission to issue the permit and the emergency permit without the challenged conditions, and held that the Commission take nothing by its complaint.

DISCUSSION

I

STANDARD OF REVIEW FOR NEW DEVELOPMENT WITHIN THE MEANING OF SECTION 30212

If the decision of an administrative agency substantially affects a "fundamental vested right," the trial court must not only examine the administrative record for errors of law, but also must exercise its independent judgment upon the evidence.[2] However, when the administrative decision neither involves nor substantially affects such a right, the trial court must review the entire administrative record to determine whether the findings are supported by substantial evidence and if the agency committed any errors of law. *(Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392, 395; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.)

If the trial court was authorized to exercise its independent judgment on the evidence, the reviewing court can overturn its factual findings only if the evidence received by the trial court, including the administrative record, is insufficient as a matter of law to sustain the finding. If, however, the trial court was limited to the substantial evidence test, the appellate court also applies that same test. *(Patterson v. Central Coast Regional Com.* (1976) 58 Cal.App.3d 833, 842.)

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[2]Subdivision (e) of Code of Civil Procedure section 1094.5 provides: "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

In the context of land use, a property owner acquires a vested right to continue a use actually instituted notwithstanding an intervening change in the law that would otherwise preclude it. (*Patterson v. Central Coast Regional Com., supra,* 58 Cal.App.3d 833, 843; *McCarthy v. California Tahoe Regional Planning Agency* (1982) 129 Cal.App.3d 222, 230; see § 30608.) However, the landowner is required to present his exemption claim to the Commission as a condition to raising it in the trial court. (*South Coast Regional Com. v. Gordon* (1977) 18 Cal.3d 832; *State of California v. Superior Court* (1974) 12 Cal.3d 237.)

The term "vested" in the sense of "fundamental vested rights" to determine the scope of judicial review, however, is not synonymous with its use in the "vested rights" doctrine relating to land use and development. (*McCarthy v. California Tahoe Regional Planning Agency, supra,* 129 Cal.App.3d 222, 229.) To determine the scope of judicial review, the term has been used to denote generally a right "already possessed" (*Bixby v. Pierno, supra,* at p. 146) or "legitimately acquired" (*Strumsky v. San Diego County Employees Retirement Assn.,* (1974) 11 Cal.3d 28, 34), for example, in the area of licensing and permit applicants and recipients. (*Harlow v. Carleson* (1976) 16 Cal.3d 731, 735.) "In short, a vested right for review purposes means a preexisting right while a vested right for construction means a right the government is estopped to deny." (*McCarthy, supra,* at p. 230.) However, the test for 'vestedness' and 'fundamentalness' are one and the same. "The ultimate question in each case is whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgement by a body lacking *judicial* power." (*Frink v. Prod* (1982) 31 Cal.3d 166, 176, emphasis in original.)

Wherein lies the "right" to construct a revetment or seawall to protect one's dwelling from destruction? Respondent argues that the right involved here is *not*, as the Commission posits, the right to develop property in the coastal zone without a permit; it is the right to protect one's home from destruction and the right of privacy; the right to peaceful use and enjoyment of a home lawfully acquired; the right to exclude others from property lawfully acquired; and the right not to have one's yard acquired by government without payment of just compensation when one must act because of forces beyond control to exercise those first three rights.

Commission argues that a fundamental right to protect one's property under the Constitution (Cal. Const., art. 1, § 1) is not the equivalent of a vested right to protect property in a particular manner where the method chosen is one that is regulated by government; there can be no vested right to undertake such protection absent prior governmental approval to do so. We agree. There is no constitutional right to own property free from regulation. Neither the state nor the federal Constitution guarantees any person absolute liberty of action. (*Max Factor & Co. v. Kunsman* (1936) 5 Cal.2d 446, 458.) "We do not consider lightly the importance of the constitutional guarantee attaching to private ownership and use of real property. [] However, more than 50 years ago, it was clearly established that property ownership rights, reserved to the individual by constitutional provision, must be subordinated to the rights of society. It is now a fundamental axiom in the law that one may not do with his property as he pleases; his use is subject to reasonable restraints to avoid societal detriment . . . ." (*People v. Byers* (1979) 90 Cal.App.3d 140, 147-148; *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 515.)

Respondent did not seek to establish that it was exempt from coastal development permit requirements because it came within the parameters of section 30610. That section provides that no coastal development permit shall be required for certain types of development such as improvements to existing single-family residences, repair or maintenance activities that do not result in an addition to, or enlargement or expansion of the object of those repair or maintenance activities, and replacement of any structure, other than a public works facility, destroyed by a disaster. It could not do so because it did not "repair" anything. Without obtaining a permit, it added *new* construction which protruded seaward of the existing structures. Since there was no prior approval and since the revetment did not exist before the Coastal Act, there is no governmental estoppel.

Nor is respondent's asserted right to construct a revetment "fundamental" in the *Bixby-Strumsky* sense. Respondent seeks to avoid application of settled California land use law in determining standard of review by challenging the constitutionality of provisions of the Coastal Act and, because of that challenge, then argue its right is "fundamental." As we will explain *infra,* its constitutional challenge fails. Respondent's "right" to construct a *new* such revetment in a coastal area, an area of public trust, is not a right "already possessed" or "legitimately required." Respondent's use of its property must be subject to "reasonable restraints to avoid societal detriment." *(People v. Byers, supra,* at 147-148.)

The original building permits for construction of residences did not give respondent a preexisting right to unregulated new construction. Moreover, the Commission did not *deny* them the right to construct a revetment. The question is only the reasonableness of the conditions attached.

Section 30106 defines "development" as "the placement or erection of any solid material or structure; . . . change in the density or intensity of use of land . . . ; construction, reconstruction, demolition, or alteration of the size of any structure. . . ." Respondent's revetment constituted a development which did not come within any of the permit exceptions and was not a "use actually instituted" which respondent had a right to continue or the concomitant right to protect. (See *Patterson v. Central Coast Regional Com., supra,* at p. 843.) Thus Whaler's Village did not have a fundamental vested right to develop property in the Coastal Zone without a permit issued pursuant to the Coastal Act *(Georgia-Pacific Corp. v. California Coastal Com.* (1982) 132 Cal.App.3d 678, 697) and the appropriate standard of review for the trial court was the substantial evidence test. Consequently, we review the administrative record to determine whether the Commission's decision is supported by substantial evidence in light of the whole record. *(City of San Diego v. California Coastal Com.* (1981) 119 Cal.App.3d 228, 232.)

II

Dedication of Public Access

Respondent contends that recent United States Supreme Court cases establish that the Commission's beach access and use conditions constitute a "taking" without just compensation prohibited by the Fifth Amendment of the United States Constitution. *(Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104; *Kaiser Aetna v. United States* (1979) 444 U.S. 164; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419.)

Does the Commission's constitutional and statutory mandate allow it to exact access dedications as a condition of development? There is a clearly enunciated state

public policy in favor of allowing public access to shoreline areas. *(County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, 222; Cal. Const., art. X, § 4.) One of the objects of the 1976 version of the Coastal Act was to preserve existing public rights of access to the shoreline and to expand them for the future. *(Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 163.) This resulted from an awareness of the deterioration in the quality and availability of recreational land along the California coastline due to the combined factors of increased demand and simultaneous decreased supply. *(Id.*, at p. 162.)

Section 30210, as amended in 1978, provides: "In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse."

Section 30211 provides that "[d]evelopment shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization . . . ."

Section 30212 as amended through 1983 provides: "(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway."

It is within this statutory framework that conditions requiring public access dedication are imposed upon the approval of coastal development permits, and courts have upheld damage to private property rights where the state or its subdivisions have acted to promote public trusts even though this action might be deemed a taking in a non-trust context. *(Grupe v. California Coastal Com.* (1985) 166 Cal.App.3d 148; 28 UCLA L.Rev. 1049 (1980-81) Comment: *Public Beach Access Exactions: Extending The Public Trust Doctrine To Vindicate Public Rights,* Jonathan M. Hoff; for example, see *Miramar Co. v. City of Santa Barbara* (1943) 23 Cal.2d 170; *Henry Dalton & Sons Co. v. Oakland* (1914) 168 Cal.463.)

Respondent argues that its right of privacy is constitutionally protected and may be abridged only where there is a compelling public need. *(City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130.) What respondent disregards is that homeowners in Whaler's Village live adjacent to a constitutionally and statutorily designated area owned by the State in trust for all the people of the State. The right of privacy does not extend to exclusion of the public from access to public trust lands. Courts have liberally construed the purposes of public trusts "to the end of benefiting all the people of the state." *(Colberg, Inc. v. State of California Ex Rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 417; see also *Miramar Co. v. City of Santa Barbara, supra,* 23 Cal.2d 170.) Thus we limit the scope of our inquiry to the question whether the Commission's use and access conditions bear a reasonable relationship to a proper legislative goal. *(Perez v. City of San Bruno* (1980) 27 Cal.3d 875, 890.)

Courts in this state have consistently recognized and upheld the Commission's authority to require dedication of public access as a condition of permit approval. (See *Natural Resources Defense Council, Inc. v. California*

Coastal Zone Conservation Com. (1976) 57 Cal.App.3d 76, 92; *Frisco Land & Mining Co. v. State of California* (1977) 74 Cal.App.3d 736, 754; *Liberty v. California Coastal Com.* (1980) 113 Cal.App.3d 491, 500; *Grupe v. California Coastal Com., supra,* 166 Cal.App.3d 148, 165.) As stated in *Georgia-Pacific Corp. v. California Coastal Com., supra,* 132 Cal.App.3d 678, 699, "A regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this. . . ." Thus, as a general proposition, the Commission may constitutionally require uncompensated access dedication as a condition of approving coastal development. (*Id.,* at pp. 698-699; *Sea Ranch Ass'n. v. California Coastal Com'n* (1981) 527 F.Supp. 390, 393-395 vacated because of mootness 454 U.S. 1070.)

Respondent argues that the general legislative goal of achieving maximum public access to the beach does not give the Commission unbridled discretion to impose an access condition upon a permit for construction which does not impede public access. Amicus Curiae, Pacific Legal Foundation, contends that section 30212 does not authorize the commission to exact more public access from every beachfront development. Both read the legislative intent and the Commission's findings too narrowly.[3]

In *Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623, 627, this court stated, "If as a condition to receipt of a permit, the applicant must donate property for a public use that bears no relationship to the benefit conferred on the applicant or the burden imposed on the public, there is a taking of property without payment of

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[3]We granted Pacific Legal Foundation's request to respond to issues raised on appeal and its request that we take judicial notice of the Public Access Interpretive Guidelines adopted by the Commission February 20, 1980. (Evid. Code §§ 452, 459.)

just compensation in violation of the United States Constitution. . . . This is the basis for California court decisions invalidating such conditions . . . . [¶] Conversely, if there is such a rational relationship, the requirement of dedication of property or payment of money in lieu thereof is a validly imposed condition."

Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. 419, relied upon by respondent, is distinguishable from the instant case. In *Loretto,* a New York statute permitted *Teleprompter,* a cable television company, to install cables on apartment buildings to provide tenants with television service without paying owners of the buildings. There, as distinguished from the case before us, the apartment owners had taken no action which could trigger the police power of the state, and the Supreme Court found this physical intrusion improper unless payment was made. *Kaiser Aetna v. United States, supra,* 444 U.S. 164, is similar. In *Kaiser,* petitioners notified the Army Corps of Engineers of their plans to dredge and fill parts of Kuapa Pond, erect retaining walls and build bridges to create Hawaii Kai Marina. The Corps advised them they were not required to obtain permits. The Corps also acquiesced in a proposal to dredge an 8-foot deep channel to connect the pond to Maunalua Bay and Pacific Ocean. When it was finished, a dispute arose concerning whether property owners could deny public access to the pond. The Supreme Court found the Corps' requirement of public access impermissible: "We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or *could have conditioned its approval* of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel

dredged by them with the consent of Government. While the consent of individual officials representing the United States cannot 'estop' the United States, ... it can lead to the fruition of a number of expectancies embodied in the concept of 'property'-expectancies that, if sufficiently important, the Government must condemn and pay before it takes over the management of the land-owner's property . . . ." (p. 179; emphasis added.)

In the instant case, it was the homeowners' action which triggered the police power to regulate what they were constructing and there was no prior governmental approval on which they relied. Moreover, there is no "set formula" to determine when " 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." (*Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104, 124.) In an analogous setting, the United States Supreme Court, as well as the California Supreme Court have held that a zoning ordinance "may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property." (*Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 277; see also *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 413.) It is likely that the California Supreme Court would apply the same "diminution in value" test to determine whether a taking has occurred in the present context. (*Grupe v. California Coastal Com., supra,* 166 Cal.App.3d 148, 175.) While property values in Whaler's Village may not be as high without a private beach, it cannot be said that by offering to dedicate a public access easement, the homeowners would lose all reasonable use of their property and therefore all economic use (*Ibid.;* citing *Agins, supra*) or that their burden is proportionately greater than other property owners who undertake new development within the coastal zone. Moreover, re-

spondent is benefited by the permit to construct the revetment since the property is worth more with the protection of the revetment than without it. (See *Associated Home Builders Etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 644.) In fact, without the revetment there might be no homes at all.

Both respondent and amicus curiae contend that section 30212 is inapplicable to the instant case. That section mandates that "public access .... to and along the coast shall be provided in new development projects." Respondent argues that Whaler's Village is not a new development and that the Commission's interpretation, i.e., that anything not specifically exempted from being a "new development" under section 30212(b) is by definition a "new development", is unconstitutional as applied. We disagree.

The Coastal Act defines "new development" in exclusionary terms and projects not reached by the exclusionary definitions of section 30212 subdivision (b) are "new developments". (*Georgia-Pacific Corp. v. California Coastal Com., supra,* 132 Cal.App.3d 678, 698.) When statutes express certain exceptions to a general rule, other exceptions are not to be implied or presumed. (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195.) Section 30106 broadly defines "development". Nevertheless, projects which present little adverse impact on the coastal resources do not require permits. (§ 30610.) Thus, homeowners may engage in a broad range of repair and maintenance activities, including replacing structures destroyed by disaster, without a permit. Additionally, a property owner may obtain a waiver of the permit requirements by the Commission's executive director for "de minimis" projects not specifically exempted by section 30610 "... if the executive director determines that it involves no potential for any adverse effect, either individ-

ually or cumulatively, on coastal resources . . . ." (§ 30624.7.) Furthermore, although the Coastal Act specifically allows revetments and seawalls to protect existing structures or public beaches in danger of erosion "when designed to eliminate or mitigate adverse impacts on local shoreline sand supply" (§ 30235), these constructions are not exempt from the "reasonable terms and conditions" requirements of section 30607.

Before imposing an access condition, the Commission must still assess the factors enumerated in section 30212, subdivision (a) and determine, how to impose necessary conditions "in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. . . ." (§ 30214, subd.(b).) Thus a finding of "new development" does not *automatically* impose a public access condition. In the instant case, the administrative record substantiated that there is inadequate lateral public access in the subject area.

Respondent challenges the nexus between the Commission's finding that the revetment imposes a burden on the public which justifies imposition of the access condition and the evidence in the record. (See *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) In point, respondent argues that the Commission found a public "burden" because seawalls *in general* tend to cause additional sand scour on any historically eroding beach but did not find that this particular revetment caused such damage. Although police power permits the imposition of reasonable conditions upon the landowner's proposal, not all conditions are valid and a grant of public privilege may not be conditioned upon the deprivation of constitutional protections. *(Scrutton v. County of Sacramento* (1969) 275 Cal.App.2d 412, 421.)

Where the conditions imposed are not reasonably related to the landowner's proposed use but are imposed by a public entity to shift the burden of providing the cost of a public benefit to one not responsible for or only remotely or speculatively benefiting from it, there is an unreasonable exercise of police power. *(Liberty v. California Coastal Com.* (1980) 113 Cal.App.3d 491, 502.)

The Commission found that "[t]he construction of this seawall constitutes 'new development' in accordance with Section 30212 because it constitutes an intensification of land use which places a burden on public access to and along State tide and submerged lands. As a result, this project must provide for a corresponding public access benefit in the form of an offer to dedicate a lateral public access easement for passive recreational use."

There is substantial evidence in the administrative record to support the staff's conclusion that seawalls and revetments tend to cause sand loss from beach areas in front of and adjacent to them even if they protect immediate structures. Studies cited in staff reports concerning other permit applications before the Commission confirm the staff's finding that "by artificially building up the slope of the shore area, seawalls and revetments of this type tend to cause a landward retreat of the mean high tide line, potentially affecting the boundary between public and private lands along the beaches adjacent to the project as well as on the project site itself."

As this Court stated in *Remmenga v. California Coastal Commission,* it is firmly established that the justification for required dedication is not limited to the needs of or burdens created by the project. (163 Cal.App.3d 623, 628 citing *Ayres v. City Council of Los Angeles* (1949) 34 Cal.2d 31; *Associated Home Builders, Etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633.) "[E]ven if an individual project does not create an immediate need for a

compensating accessway, one may be required of it if its effect together with the cumulative impact of similar projects would in the future create or increase the need for a system of such compensating accessways." *Remmenga, supra,* at p. 628.) Although respondent's revetment may constitute only a small impediment to public access, "... when viewed as part of the entire [coastline] as it develops in the future the proposed improvement may well be a link in a chain barring access or making access more difficult and costly." (*Id.,* at p. 630.)

Additionally, section 30105.5 provides that "... the incremental effects of an individual project shall be reviewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." Thus, the validity of the condition is not destroyed because the development has no *direct* nexus to the condition, the benefit to the public is greater than to the developer, or future needs are taken into consideration. (*Sea Ranch Ass'n v. California Coastal Com'n, supra,* 527 F.Supp. 390, 395.)[4] It is enough that the project "contributes, at least in an incidental manner" to the need for a particular extraction. (*Grupe v. California Coastal Com., supra,* 166 Cal.App.3d 148, 167, fn. 11.)

The Commission had sufficient information before it to conclude that, due to construction of this revetment *and others* up and down the coast, the erosive nature of the beaches in Ventura County coupled with the tendency of seawalls and revetments to increase the sand loss on beaches with a tendency to recede constitutes a cumulative adverse impact and places a burden on public access to and along State tide and submerged lands for which corresponding compensation by means of public access is

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[4]Although *Sea Ranch* was later vacated because enactment of section 30610.6 rendered it moot, we find its reasoning still apropos.

reasonable. (See *Remmenga v. California Coastal Com., supra*, at p. 630; *CEEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 321-323.) Staff reports concerning various applications before the Commission referred to surveys of the Army Corps of Engineers and other experts concerning shoreline erosion along the California coast and, in particular, beach erosion in Ventura County. Opinion evidence of experts in environmental planning or ecological sciences is a permissible basis for decision. (*City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 491.) Respondent stipulated to the admissibility of the administrative record. That stipulation specifically provided that the parties "waive their right to object to the competency of that administrative record."

Therefore, the condition of offering to dedicate an easement for public access was reasonably related to one of the principal objectives of the Coastal Act, which is to provide for maximum access to the coast by all the people in this State (§ 30001.5, subd. (c)) and was supported by the evidence in the record. Its relationship to the "nature and impact" of the proposed project was not a valid basis for the trial court's determination that the access condition deprived Whalers' Village of its constitutional rights. (*Georgia-Pacific Corp. v. California Coastal Com., supra*, 132 Cal.App.3d 678, 699.)[5] Moreover, the burden of this condition may be minimal. If, as respondent argues, there is no need for public access at that particular location

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[5]We reject respondent's assertion that the Commission's abandonment of an appeal, discussed in *Pacific Legal Foundation v. California Coastal Com., supra*, 33 Cal.3d 158, is a concession that the same studies upon which the Commission relies here do not support a showing that the revetment in question will have an adverse impact on lateral public access. The Mussel Shoals appeal involved repair to a seawall and section 30212, subdivision (b)(5) requires a showing that repair work will have an adverse impact on lateral public access.

because it leads to another private beach, it is likely no public agency or private association will accept the offer to dedicate the public easement with its attendant liabilities and maintenance. (See *Grupe v. California Coastal Com., supra,* 166 Cal.App.3d 148, 184.)

III

Abuse Of Discretion

Although we conclude that the Commission could impose the condition of offering to dedicate an easement for public access without offending constitutional principles, we find it abused its discretion in restricting respondent from interfering with the public's *present* use of the areas subject to easement prior to the acceptance of the offer. The provision in question turns the offer to dedicate public access into an immediate easement which imposes both liability and maintenance on the property owner and violates the express language of section 30212 as well as the Commission's Interpretative Guidelines. This restriction would be appropriate where public rights of access may have arisen through use or implied dedication. (See Pub. Resources Code, § 30211; *Gion v. City of Santa Cruz* (1971) 2 Cal.3d 29.) However, there was no issue of public rights acquired through use in the instant case. Hence, that provision must fall.

The trial court found no support in the record or the Coastal Act for the conditions of waiver of claim of liability against the Commission or other public agency and acknowledgment that the property owners may not be eligible for public disaster funds.[6] We agree in part. The condition does not compel respondent to waive claims of *liability for issuance of the permit,* but for any damage

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[6]Government Code section 818.4 already provides immunity to public entities for issuance or refusal to issue permits.

from erosion hazard. Thus it waives liability for any act of any public agency that might cause erosion hazard. This condition was overbroad. The Commission could extract a more narrowly drawn assumption of liability from erosion hazard and waiver of claims against the Commission or any agency involved in the issuance of the permit for damage caused by erosion or storms.

We agree with the trial court that there is no support in the record nor any legal authority offered to substantiate the condition that respondent acknowledge it may not be eligible for public disaster funds. The Commission will have to use other methods to alert permit applicants of this possibility.

The Commission contends that the trial court erred in refusing to remand the matter to the agency for corrective action. We disagree. The trial court remanded the matter to the Commission to issue the permit without the offending conditions. Further proceedings were unnecessary since the Commission had already considered the matter carefully when it imposed the conditions. (See *Georgia-Pacific Corp. v. California Coastal Com., supra,* 132 Cal.App.3d 678, 703; *Beach Colony II v. California Coastal Com.* (1984) 151 Cal.App.3d 1107, 1119.)

IV

Complaint for Civil Fines and Penalties

The Commission contends the trial court's decision to deny it any recovery in the penalties action should be reversed and the matter remanded for hearing on the issue of the amount to be assessed against Whalers' Village for its violation of the Coastal Act. Respondent counters that to have sought and accepted the permit with the challenged conditions could have constituted a waiver of its right to challenge the conditions. *(County of Impe-*

rial v. McDougal (1977) 19 Cal.3d 505. 510-511; but see *McLain Western #1 v. County of San Diego* (1983) 146 e/x11445/Cal.App.3d 772, 775-776.)

It has been held that a violator's good faith belief in the legality of his actions presented a defense to the imposition of civil penalties if such belief is found to have been reasonably entertained. (See *South Coast Regional Com. v. Gordon, supra,* 84 Cal.App.3d 612, 617-618. fn. 7, citing *No Oil, Inc. v. Occidental Petroleum Corp.* (1975) 50 Cal.App.3d 8, 30.) Here, Whaler's Village knew it needed a permit for construction in 1980 and the trial court acknowledged a permit was required for revetment activities, including mechanized construction in 1980 and repairs in 1981. The question presented is whether, due to the extensive time-span, i.e., 1978-1981, in which respondent was involved in planning and construction of the revetment and the withdrawal of its 1978 permit application, its actions could be interpreted as a "good faith belief reasonably entertained of the legality of [its] conduct." *South Coast Regional Com. v. Gordon, supra,* 84 Cal.App.3d 612, 617-618.) Because of its incorrect ruling on the validity of all the conditions, the trial court should have the opportunity to redetermine whether, when respondent violated the Coastal Act in constructing the revetment and repairing it without appropriate coastal permit, its actions were in good faith and its violations intentional. Therefore, we remand the matter to the trial court for a determination of the Commission's action for injunctive relief and civil penalties in light of the opinion.

The judgment is reversed in part to allow the Commission to reissue the permit with the condition that respondent irrevocably offer for a period of twenty-one years to dedicate to a public agency or private association approved by the Executive Director, an easement for public access and passive recreational use along the shoreline

and that respondent assume liability for damage from erosion and waive claims against the Commission and any other public agency involved in issuance of the permit for any damage caused by erosion hazard. We remand to the trial court the issue of the Commission's action for injunctive relief and civil penalties for determination in light of this opinion. The judgment is otherwise affirmed.

Each party to bear its own costs.

CERTIFIED FOR PUBLICATION
STONE, P. J.

We concur:
GILBERT J.
ABBE, J.

ROBERT J. SOARES, Judge

SUPERIOR COURT COUNTY OF VENTURA

John K. Van de Kamp, Attorney General, N. Gregory Taylor, Assistant Attorney General and Jamee Jordan Patterson, Deputy Attorney General, for Respondent, Plaintiff and Appellant.

Ball, Hunt, Hart, Brown and Baerwitz, Charles E Greenberg and Agnes H. Mulhearn; John W. Wissinger, for Petitioner, Defendant and Respondent.

Ronald A. Zumbrun, Robert K. Best and Timothy A. Bittle, Pacific Legal Foundation, as Amicus Curiae on behalf of Petitioner, Defendant and Respondent.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

December 31, 1985

I have this day filed Order

REVIEW DENIED: Masli J.

Lucas J. of the opinion that the petition should be granted.

In re: 2 Civil No. B005654
WHALERS' VILLAGE CLUB
vs.
CALIFORNIA COASTAL COMMISSION

Respectfully,

Clerk
January 2, 1986

REVIEW DENIED: Masli J.

APPENDIX C

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IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX
2nd Civil No. B005654
WHALERS' VILLAGE CLUB,
Appellant,
VS.
CALIFORNIA COASTAL COMMISSION,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Whalers' Village Club, Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California entered December 31, 1985, denying a hearing of the opinion of the Court of Appeal of the State of California, Second Appellate District.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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Dated: March 21, 1986.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On March 28, 1986, I served the within Jurisdictional Statement in re: "Whalers' Village Club v. California Coastal Commission" in the United States Supreme Court, October 1985, No. ;

on the parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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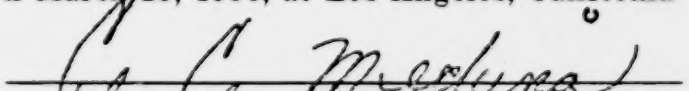
Attention:
Hon. Robert J. Soares, Judge

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 28, 1986, at Los Angeles, California



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No. 85-1606

Supreme Court, U.S.
FILED
APR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WHALERS' VILLAGE CLUB,

Appellant,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Supreme Court of California

MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
MOTION TO DISMISS OR AFFIRM	1
STATEMENT OF THE CASE	2
I. THE ISSUES PRESENTED BY THIS APPEAL ARE SO BASIC TO LONG-ESTABLISHED LAW ON LAND USE REGULATION AS TO REQUIRE NO FURTHER ARGUMENT	6
A. Appellant Misrepresents This Court's Prior Decisions	7
B. The Opinion of the Court Below Comports With This Court's Decisions Analyzing Whether Governmental Regulation Amounts to a Taking	9
II. APPELLANT HAS NOT BEEN DENIED THE RIGHT TO DETERMINE WHETHER CONSTITUTIONAL RIGHTS HAVE BEEN ABRIDGED	10
III. APPEAL TO THIS COURT IS IMPROPER	11
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Agins v. Tiburon (1980) 447 U.S. 255 9

Associated Home Builders, etc., Inc. v. City of Walnut Creek (1971) 4 Cal.3d 633 6

Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, et al. (1971) 404 U.S. 878 [App. dismissed No. 7186] 2,6

CEEED v. California Coastal Zone Conservation Com. (1974) 43 Cal.App.3d 306 3

Kaiser Aetna v. United States (1979) 444 U.S. 164 7,8

Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419 7

McClain Western #1 v. County of San Diego (1983) 146 Cal.App.3d 772 4

Remmenga v. California Coastal Commission (1985) __ U.S. __ [88 L.Ed.2d 250, 106 S.Ct. 241] 2,6

Sederquist v. City of Tiburon (9th Cir. 1984) 765 F.2d 756 9

TABLE OF AUTHORITIES (Continued)

Page

STATUTES

Public Resources Code,
Section 30000 et seq. 8
Section 30001.5(c) 3
Section 30212 3
Section 30212(a) 5

28 U.S.C. section 1257(2) 11

CONSTITUTIONS

California Constitution, article X, section 4 3

United States Constitution, Fifth Amendment 5

No. 85-1606

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WHALERS' VILLAGE CLUB,

Appellant,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Supreme Court of California

MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

The California Coastal Commission, appellee herein, respectfully moves this Honorable Court to dismiss the appeal now pending or, in the alternative, to affirm the decision of the California Court of Appeal, Second Appellate District, Division Six on the following grounds:

A. The questions on which the decision of the cause depends are insubstantial and do not require further argument. These same issues have previously been presented to this court in the recent cases of *Remmenga v. California Coastal Commission* (1985) __ U.S. __ [106 S.Ct. 241, 88 L.Ed.2d 250] and *Associated Home Builders of the Greater East Bay Inc. v. City of Walnut Creek, et al.* (1971) 404 U.S. 878. In each case, the appeal was dismissed for want of a substantial federal question.

B. This appeal is improvidently brought because the decision of the Court of Appeal did not involve the validity of a state statute. Rather, it involved the application of the California Coastal Act by appellee California Coastal Commission in a particular factual context. Moreover, appellant has not stated grounds for review by this Court under certiorari.

STATEMENT OF THE CASE

This appeal attacks the ability of the California Coastal Commission to regulate new coastal development. Specifically, it attacks the ability of the California Coastal Commission to protect publicly-owned tidelands and the people's right of access to those lands, guaranteed by the state constitution, from the erosive effects of newly constructed seawalls. The beaches of California are a finite resource whose gradual erosion may be hastened by the construction of seawalls and the impacts of those seawalls on shoreline processes. At stake here is the ability of the California Coastal Commission to balance public rights in tidelands and access to them with the need of coastal property owners to protect their private property by requiring dedication of public access in exchange for permit approval to construct seawall revetments. Traditional land use law has long recognized the power of government to condition its approval of development upon dedication requirements to lessen or avoid potential impacts on public resources. This case is no different.

Under article X, section 4 of the California Constitution,[1] no upland owner may interfere with the public's right of access to the sea. Further, the State Legislature is obligated to enact all laws necessary to make public access always attainable. Pursuant to this mandate and in light of the growing public awareness of the deleterious impacts of development on the coast, the California Legislature enacted the Coastal Act of 1976.[2] One of the express goals of the Legislature's enactment is to maximize public access to and along the coast. (Pub. Resources Code, § 30001.5(c).) Section 30212 of the Coastal Act provides in pertinent part:

> "(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway."

---

[1] "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

[2] In 1972, the people of California adopted the Coastal Initiative which found and declared that the coastal zone is a distinct and valuable resource belonging to all the people, that it exists as a delicately balanced ecosystem and that the permanent protection of the remaining natural and scenic resources of the coastal zone is a paramount concern to present and future residents of the state and nation. (*CEEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 321.) The 1976 Act is the legislative continuation of that Coastal Initiative.

It is within this context that the dedication condition at issue here was required.

The facts of this case are accurately set forth in the California Court of Appeal decision attached as Appendix A to appellant's Jurisdictional Statement. Briefly, appellant Whalers' Village Club ("Whalers' Village") consists of 29 single-family homes built in 1969. In 1978, massive storms threatened the complex. The homeowners were informed by their consultants that a seawall revetment constructed seaward of the beachfront homes would protect them. (Juris. State., App. A, p. 2.) Whalers' Village sought permission from appellee's predecessor, the Regional Commission, to construct such a seawall revetment. (*Ibid.*) When Regional Commission staff recommended permit approval subject to a public access condition pursuant to the Coastal Act, the homeowners withdrew their permit application. (*Id.* at p. 3.)

In 1980, additional storms threatened the beachfront units. Without applying for a permit, Whalers' Village constructed a massive seawall revetment on the beach in front of the entire complex, consisting of 5-7 ton boulders with 50-150 pound boulders and gravel fill extending 3-5 feet above the beach level and 6-8 feet into the sand. (*Ibid.*) It was not until after the revetment was fully in place that Whalers' Village sought the required coastal development permit from appellee Commission. (*Ibid.*)[1] The Commission approved a permit for the seawall revetment subject to the condition that Whalers' Village offer to dedicate an easement for public lateral access and passive recreational use. (*Ibid.*)

Whalers' Village challenged the Commission's imposition of the beach access and use condition as a "taking" without just

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[1] Whalers' Village insinuates it could not have applied for and accepted an emergency or regular permit and subsequently challenge any condition it found offensive. Whalers' Village ignores California case law recognizing an ability to subsequently challenge conditions where acceptance of the permit occurs under exigent circumstances. (*McLain Western #1 v. County of San Diego* (1983) 146 Cal.App.3d 772, 775-776.)

compensation prohibited by the Fifth Amendment to the United States Constitution. The California Court of Appeal rejected appellant's contention. The Court held that "as a general proposition, the Commission may constitutionally require uncompensated access dedication as a condition of approving coastal development." (*Id.* at p. 13.) Specifically, the court held:

> ". . . the condition of offering to dedicate an easement for public access was reasonably related to one of the principal objectives of the Coastal Act, which is to provide for maximum access to the coast by all the people in this State (§ 30001.5, subd. (c)) and was supported by the evidence in the record. Its relationship to the 'nature and impact' of the proposed project was not a valid basis for the trial court's determination that the access condition deprived Whalers' Village of its constitutional rights. (*Georgia-Pacific Corp. v. California Coastal Com., supra*, 132 Cal.App.3d 678, 699.) Moreover, the burden of this condition may be minimal. If, as respondent argues, there is no need for public access at that particular location because it leads to another private beach, it is likely no public agency or private association will accept the offer to dedicate the public easement with its attendant liabilities and maintenance. (See *Grupe v. California Coastal Com., supra*, 166 Cal.App.3d 148, 184.)" (Juris. State., App. A, pp. 20-21; fn. omitted.)[4]

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[4] The public access easement need not be opened to public use until a public agency or private association accepts responsibility for maintenance and liability. (Pub. Resources Code, § 30212(a).)

I

THE ISSUES PRESENTED BY THIS APPEAL ARE SO BASIC TO LONG-ESTABLISHED LAW ON LAND USE REGULATION AS TO REQUIRE NO FURTHER ARGUMENT

Appellant's attack in this case is on principles of constitutional law uniformly applied in California for more than 35 years with which this court has concurred either by express holdings or through dismissal of prior appeals. This appeal presents issues so basic to long-established law on land use regulation that no further argument is required.

In *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek et al., supra*, 404 U.S. 878, this court concurred with a California Supreme Court decision upholding the constitutionality of dedication requirements as a condition to approval of new development. (*Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633.) The validity of such dedication requirements is not dependent upon a factual showing that the development has created the need for it.

Similarly, this Court recently rejected an appeal, for lack of a substantial federal question, in a case challenging appellee Comission's ability to require fees in lieu of actual dedications for provision of public access. (*Remmenga v. California Coastal Com., supra*, 88 L.Ed.2d 250.) In that case, the California Court of Appeal had upheld imposition of fees, in lieu of provision of dedicated public access, against a constitutional challenge identical to that proferred by appellant here.

Appellant's argument that the Commission cannot require an offer of dedication as a condition to approval of new development merits no further consideration by this court.

A. Appellant Misrepresents This Court's Prior Decisions

Appellant asserts that recent decisions of this court establish the Commission's beach access and use condition constitutes a "taking" without just compensation. The cases relied upon by appellant are simply not applicable to the facts of this case.

Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419 involved a situation where the property owner took no action which could trigger the police power of the State of New York. New York enacted a statute permitting Teleprompter, a cable television company, to install television cables on apartment buildings without paying the owners of the buildings. This court found this physical intrusion without any action of the property owner was improper unless payment was made. The case does not involve a permit situation like the present one where the property owner seeks governmental authorization to effect a change in his property and, in approving this change, the government attaches conditions to its approval.

In *Kaiser Aetna v. United States* (1979) 444 U.S. 164, the property owners had obtained prior approval from the Army Corps of Engineers to dredge and develop a marina. Once the marina was finished, the Corps then sought to require it be opened to the public.[5]

The court held that to do so would require compensation, stating:

> "We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have

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[5] Appellant's recitation of the facts in *Kaiser Aetna* is misleading. (Juris. State., pp. 11-12, 15-16.) A careful reading of this court's discussion of the facts of the case dispells any similarity to the facts presented here. (*Kaiser Aetna v. United States, supra*, 444 U.S. 166-169.)

> impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot 'estop' the United States [citations], it can lead to the fruition of a number of expectancies embodied in the concept of 'property' -- expectances that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property. . . ." (*Id.* at p. 179.)

Unlike *Kaiser Aetna*, Whalers' Village here cannot claim that the prior consent of the Commission has somehow given rise to any expectancy.[6] On the contrary, Whalers' Village admitted that it undertook its construction with the full knowledge that a permit was required and that a condition requiring an offer to dedicate an easement for public access would likely be imposed, as required by the Coastal Act of 1976. (Pub. Resources Code, § 30000 et seq.) Appellant's reliance on *Kaiser Aetna* and *Loretto* to support it's claim of a "taking" is misplaced.

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[6] As noted by the Court of Appeal, "[t]he original building permits for construction of residences did not give . . . [Whalers' Village] a preexisting right to unregulated new construction. . . ." (Juris. State., App. A, p. 9.) "[I]t was the homeowners' action which triggered the police power to regulate what they were constructing and there was no prior governmental approval on which they relied. . . ." (*Id.* at p. 15.)

B. The Opinion of the Court Below Comports With This Court's Decisions Analyzing Whether Governmental Regulation Amounts to a Taking

The Court of Appeal found that the beach access and use condition was reasonably related to one of the principal objectives of the Coastal Act, that of providing for maximum access to the coast by all the people in California, and that the condition did not deprive the homeowners of all reasonable use of their property and therefore all economic use. (Juris. State., App. A, pp. 15, 20.) This analysis clearly comports with this court's test for determining whether a taking has occurred. As this court stated in *Agins v. Tiburon* (1980) 447 U.S. 255, 260:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928) or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36 (1978)."

Thus, contrary to appellant's claim, the standard employed by the Court of Appeal to analyze the validity of the condition imposed was not in conflict with this court's pronouncements. Appellant's characterization of the so-called "rational relationship rule" is misleading. (Juris. State., pp. 17-19.)

Appellant's reliance on the Ninth Circuit decision in *Sederquist v. City of Tiburon* (9th Cir. 1984) 765 F.2d 756 is equally inappropriate. There the city imposed conditions on development of vacant land which the landowners could not satisfy, essentially requiring "joint action" by property owners. Absent satisfaction of those conditions, the property owners were denied all economic use of their property. Here, the homeowners in Whalers' Village have not been deprived of economic use of their property. They

have not been denied a permit for the new construction nor prevented from continuing the residential use of their property.

In essence, appellant's arguments amount to an assertion that government can never require dedications in exchange for development approval. This simply ignores reality. Carried to its logical conclusion, appellant's argument would preclude street dedications, sidewalk and bicycle path dedications, park and open space dedications, school fee requirements, parking requirements and all similar means utilized to offset the impacts, individual and cumulative, which development places on public welfare and resources. Such an argument is so explicitly foreclosed by prior decisions of this court as to warrant no further consideration.

II

APPELLANT HAS NOT BEEN DENIED THE RIGHT TO DETERMINE WHETHER CONSTITUTIONAL RIGHTS HAVE BEEN ABRIDGED

Appellant's argument that it has been deprived the right to a determination of whether its constitutional rights have been abridged is specious. (Juris. State., pp. 19-22.) The Court of Appeal decision itself deals extensively with appellant's claims. Obviously appellant was not denied the opportunity to litigate whether its constitutional rights were abridged. Appellant did attempt to raise its "taking" claim by cross-complaint in a collateral attack on the Commission's decision which the trial court ruled was improper, granting summary judgment to the Commission on that ground. That ruling, however, did not affect appellant's right to raise the constitutional issues in its direct attack on the Commission's decision.

III

APPEAL TO THIS COURT IS IMPROPER

Appellant invokes the jurisdiction of this court based on 28 United States Code section 1257(2). That section allows an appeal where the validity of a state statute is drawn into question on the grounds that it is repugnant to the United States Constitution. Here, however, it is the permit decision of the California Coastal Commission, based on the factual circumstances before it, which is challenged. The Court of Appeal decision did not address the validity of a state statute; rather, it upheld the Commission's administrative decision against constitutional attack. (Juris. State., App. A, pp. 1-2.) Further, appellant did not seek review by the Supreme Court of California of the validity of a state statute. Review of the conditions attached to the Commission's permit decision only was sought. While appellant had challenged the constitutional validity of specific provisions of the Coastal Act in its First Amended Petition for Writ of Mandate, that challenge was never the basis for the decision of the state appellate court. Thus, the appeal should either be dismissed as improvidently brought or, if treated as a petition for review by writ of certiorari, review should be denied on the grounds set forth above.

CONCLUSION

The constitutional issues raised by appellant need no further review by this Court. The decision of the State Court of Appeal is entirely consistent with prior decisions of this court and with accepted land use law as it has evolved over the past century. The Court of Appeal decision should be affirmed or, alternatively, the appeal should be dismissed.

DATED: April 21, 1986

Respectfully submitted,

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No: 85-1606
October Term, 1985

WHALERS' VILLAGE CLUB,

Appellant,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

I, THE UNDERSIGNED, say: I am a citizen of the United States, 18 years of age or over, employed in the County of San Diego in which county the below stated mailing occurred, and not a party to the subject cause. My business address is 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS OR AFFIRM as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

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Attention Hon. Robert J.
Soares, Judge

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 21st day of April 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United states Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, April 21, 1986.

Jamee Jordan Patterson
JAMEE JORDAN PATTERSON

Subscribed and sworn to before me
this 21st day of April, 1986.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1986

Supreme Court, U.S.
FILED
MAY 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1606

In the Supreme Court

OF THE

United States

October Term, 1985

WHALERS' VILLAGE CLUB,
Appellant,
vs.
CALIFORNIA COASTAL COMMISSION,
Appellee.

On Appeal from the Supreme Court of California

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Page

I

Unless This Court Reviews This Case On Its Merits California Governments Will Conclude There Is No Constitutional Taking Issue Posed When Government Appends Any Dedication Requirement To Any Permit Under Any Circumstance If The Permit Is Within The Police Power Of The State 1

II

This Case Is Properly Before This Court Under 28 U.S.C. § 1257(2) 3

III

The Motion To Dismiss Contains Several Inaccurate Or Misleading Statements And Conclusions 5

Conclusion 7

TABLE OF AUTHORITIES CITED

Cases

	Page
Agins v. City of Tiburon, 447 U.S. 255 (1980)	6, 7
Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal.3d 633, 484 P.2d 606, 94 Cal.Rptr. 630, appeal dismissed, 404 U.S. 878 (1971)	2
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)	3
Cohen v. California, 403 U.S. 15 (1971)	3
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921)	3
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)	3
Kaiser Aetna v. United States, 444 U.S. 164 (1979)	5, 6, 7
Largent v. Texas, 318 U.S. 418 (1943)	4
Lawrence v. State Tax Commission, 286 U.S. 276 (1932)	5
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)	5, 6, 7
Lynch v. Household Finance Corp., 405 U.S. 538 (1972)	8
Martino v. Santa Clara Valley Water District, 703 F.2d 1141 (9th Cir. 1983)	6
Remminga v. California Coastal Commission, 163 Cal.App.3d 623, 209 Cal.Rptr. 628, *appeal dismissed,* ____ U.S. ____, 106 S.Ct. 241, *reh'g denied,* ____ U.S. ____, 106 S.Ct. 548 (1985)	3
Sederquist v. City of Tiburon, 765 F.2d 756 (9th Cir. 1984)	5
United States v. Knox, 396 U.S. 77 (1969)	3

Constitution

United States Constitution, Fifth Amendment	6
United States Constitution, Fourteenth Amendment	6

Statutes

California Government Code, Sec. 11157 (West 1980)	2
California Public Resources Code, Sec. 30212 (West 1986)	4
United States Code, Title 28, Sec. 1257(2) (1986)	3, 4, 5
United States Code, Title 28, Sec. 2103 (1982)	5

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On Appeal from the Supreme Court of California

APPELLANT'S REPLY BRIEF

I

UNLESS THIS COURT REVIEWS THIS CASE ON ITS MERITS CALIFORNIA GOVERNMENTS WILL CONCLUDE THERE IS NO CONSTITUTIONAL TAKING ISSUE POSED WHEN GOVERNMENT APPENDS ANY DEDICATION REQUIREMENT TO ANY PERMIT UNDER ANY CIRCUMSTANCE IF THE PERMIT IS WITHIN THE POLICE POWER OF THE STATE.

The Commission's Motion to Dismiss sets forth an additional compelling reason why this is an important case that should be reviewed on its merits. The Commission, through its lawyer, the Attorney General, asserts that this Court's prior actions have approved the California practice of holding constitutional *all* dedication requirements appended as conditions to any permit for any act determined to be a new development. Further, the

Attorney General also states that this Court has approved the principle that dedication requirements are not dependent upon a factual showing the development created the need for the requirement. The Attorney General concludes that this case attacks principles of constitutional law uniformly applied in California for 35 years and concurred in by this Court. (Motion to Dismiss, p.6.)

The Attorney General is the legal advisor of each department of the State in all matters relating to its powers and duties. CAL. GOVERNMENT CODE § 11157 (West 1980). If this Court does not accept this case, the Attorney General will continue to advise all California departments that they may constitutionally append any type of dedication requirement to any permit irrespective of the character of the government action, the reasonable economic expectations created in the permittee by prior government actions, or whether the development creates the need for the dedication. For all practical purposes this all-encompassing doctrine could signal the end of the right of exclusive possession for California property owners.

The Attorney General bases these broad conclusions upon this Court's dismissal of appeals in two prior cases. In 1971, this Court dismissed for want of a substantial federal question a case presenting the narrow issue of whether government may require a subdivider of raw land to dedicate sufficient park space or in-lieu fees to meet the needs of future residents of the subdivision although the public also could use the park facilities. *Associated Home Builders, Inc. v. City of Walnut Creek*, 404 Cal.3d 633, 484 P.2d 606, 94 Cal.Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971).

In 1985, this Court dismissed for lack of a substantial federal question a case involving the issue of whether the California legislature could constitutionally compromise and settle a dispute by enacting a law allowing a landowner to build on his lot if he agreed to put $5,000 into an

in-lieu fund to be used to acquire beach access located elsewhere in the subdivision. *Remmenga v. California Coastal Commission*, 163 Cal.App.3d 623, 209 Cal.Rptr. 628, *appeal dismissed*, ____ U.S. ____, 106 S.Ct. 241, *reh'g denied*, ____ U.S. ____, 106 S.Ct. 548 (1985).

It is inappropriate to conclude from the dismissal of these two cases that this Court has approved a government's appending *any* conditions it wishes to *any* permit under *any* circumstances for *any* permit request falling within the State's police power. Nevertheless, the Attorney General has set forth such a conclusion in the Motion to Dismiss. The Attorney General will construe a dismissal of this case as an affirmance of that position and so advise all California departments.

II

THIS CASE IS PROPERLY BEFORE THIS COURT UNDER 28 U.S.C. § 1257(2)

The validity of a state statute is said to have been "sustained" within the meaning of 28 U.S.C. § 1257(2) (1986) when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 288-90 (1921); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1979); *Cohen v. California*, 403 U.S. 15, 17-18 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61 n.3 (1963); cf. *United States v. Knox*, 396 U.S. 77, 79 n. 2 (1969).

Throughout this lawsuit the Homeowners repeatedly presented to the state courts their contention that the Commission's statutory construction of the Coastal Act under the circumstances of this case rendered the imposition of the offending conditions unconstitutional under federal law. The Commission acknowledges that the Homeowners challenged the constitutional validity of spe-

cific provisions of the Coastal Act in the First Amended Petition for Writ of Mandate. (Motion to Dismiss, p.11.) In the court of appeal, the Homeowners also contended that "the Commission's interpretation of [relevant Coastal Act provisions] rendered them unconstitutional as applied." (Respondent's Brief to California Court of Appeal, Second Appellate District, p.27.) Contrary to the Commission's assertion (Motion to Dismiss, p.11), the Homeowners raised the federal constitutionality of relevant Coastal Act provisions as construed by the Commission and the court of appeal both on their face and as applied to the facts of this case when seeking review from the California Supreme Court. (Petition For Review to California Supreme Court, p.17.)

Without citation, the Commission incorrectly states that since a challenge to the constitutional validity of specific provisions of the Coastal Act "was never the basis for the decision of the state appellate court" (Motion to Dismiss, p.11), the appeal should be dismissed or review denied.

The court of appeal specifically acknowledged that the Homeowners contend CAL. PUBLIC RESOURCES CODE § 30212 (West 1986) is unconstitutional as applied. The Court expressly disagreed. (CA, p.16.)

Even had the court of appeal ignored the federal grounds presented to it, this appeal should not be dismissed. An appeal under Section 1257(2) will lie even though the state court is not explicit in overruling a timely challenge on federal grounds to the validity of the state statute. See *Largent v. Texas*, 318 U.S. 418 (1943). So long as the statute is sustained, the state court has necessarily rejected the objection. The state court's silence cannot destroy the right to appeal under Section 1257(2). An erroneous failure to pass on the federal constitutional objections to the state statute is treated as equivalent to a finding of validity within the meaning of

Section 1257(2), so that an appeal will lie. *Lawrence v. State Tax Commission*, 286 U.S. 276, 282-83 (1932).

In any event, the Jurisdictional Statement so clearly raises issues of federal constitutional dimensions that even if this case were not within the provisions of Section 1257(2), review should be granted by this Court under the provisions of 28 U.S.C. § 2103 (1982).

III

THE MOTION TO DISMISS CONTAINS SEVERAL INACCURATE OR MISLEADING STATEMENTS AND CONCLUSIONS.

The Commission attempts to distinguish *Sederquist v. City of Tiburon*, 765 F.2d 756 (9th Cir. 1984) from this case on the ground the fundamental property right involved in *Sederquist* was the landowner's right to make economic use of the property rather than the right of exclusive possession. (Motion to Dismiss, pp.9-10.) The Commission misses the point. *Sederquist* was cited in the Jurisdictional Statement for the proposition that the Ninth Circuit does not agree with the court of appeal that a landowner's "triggering" an invasion of fundamental property rights by requesting a permit renders inapplicable the principles of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). For this purpose it does not matter which fundamental property right has been invaded by the government's action.

Simple logic demonstrates the Ninth Circuit rather than the California view is correct. If the California exception were valid it is difficult to visualize any situation where the invasion of a California landowner's fundamental property right of exclusive possession could ever constitute a taking. *Agins v. City of Tiburon* 447 U.S. 255 (1980) provides that a California landowner must first apply for a permit before raising Fifth and Fourteenth

Amendment rights against a taking. Now the court of appeal opinion states that a landowner's application for a permit "triggers" an exception to the rule that an invasion of the right to exclusive possession can constitute a taking. In combination, the principles of *Agins* and the court of appeal opinion make it procedurally impossible for a California landowner ever to raise the principles set forth by this Court in *Kaiser Aetna* and *Loretto*.

The Commission argues that the Homeowners' position amounts to an assertion that government can never require dedication in exchange for development approval. (Motion to Dismiss, p.10.) This argument is hyperbolic. Subdividers of raw land seldom have reasonable economic expectations created by prior government actions that street dedications, sidewalk and bicycle path dedications, park and open space dedications, school fee requirements, parking requirements, etc., will not be required in exchange for development approval.[1] Owners of lots and homes often, but not always, have such reasonable expectations depending upon prior governmental actions with respect to their property. The character of the government action also varies with the nature of the request being made of government by the property owner and the nature of the invasion imposed by government.

The Commission states California law now recognizes "an ability to subsequently challenge conditions where acceptance of the permit occurs under exigent circumstances." (Motion to Dismiss, p.4 n.3.) The case cited for this proposition was decided in 1983, several years after the homeowners of Whalers' Village placed rocks under their homes. California law in 1980 and 1981, as indicated

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[1]But see *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir. 1983) for a fact situation where a subdivider did have such expectations. Under the California interpretation of *Agins* and the Court of Appeal decision in this case, the Ninth Circuit decision in *Martino* is incorrect.

in the Homeowners' Jurisdictional Statement, foreclosed such a possibility. (Jurisdictional Statement, p.6 n.2.)

The Commission argues that the principles of *Kaiser Aetna* and *Loretto* are not applicable to this case and that the opinion of the court below comports with this Court's decision in *Agins v. Tiburon*, 447 U.S. 255 (1980). (Motion to Dismiss, pp.7-9.) The Commission quotes language in *Agins* to the effect that a general zoning law effects a taking if it denies an owner economically viable use of his land (Motion to Dismiss, p.9.) The implication drawn from this language in *Agins* is that a law extinguishing another fundamental attribute of ownership such as the right to exclusive possession would not constitute a taking and therefore the court of appeal's opinion comports with *Agins*.

The Commission misreads *Agins*. *Agins* directly states that, although the Tiburon ordinances in question limited development, "they neither prevent the best use of appellants' land . . . *nor extinguish a fundamental attribute of ownership, see Kaiser Aetna v. United States. . . .*" *Agins*, 447 U.S. at 262 (citation omitted) (emphasis added).

CONCLUSION

When the Homeowners of Whalers' Village saw the damage done to their unprotected beachfront homes as a result of unusual storms at sea, they realized that some protective device was needed to prevent those homes from later possible destruction. When they tried to comply with the California Coastal Act by seeking from the California Coastal Commission permission to protect those homes in a manner suggested by professional engineers, the Homeowners were told that the price of that protection was ceding for public use and recreation their exclusive right to use the beach portion of the property from the property line up to the homes themselves. The Homeowners believed their federal constitutional rights

in property were threatened and that they had a right to a full judicial review of the Commission's application of the Coastal Act. They ran a risk because of these beliefs and acted to protect their homes with a rock revetment. They were sued for civil fines and penalties, punitive damages and an injunction to remove their revetment. They were subjected to a California appellate review process which gives only lip service to individuals' rights in property. The Homeowners believe in the idea expressed by this Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Not only are property rights expressly protected by the Constitution, but a fundamental interdependence exists between them and the other personal rights protected by the Bill of Rights; "[n]either could have meaning without the other." *Id.* at 552. A government which exercises the disguised but unrestrained power to deprive citizens of lawfully accumulated property and threatens the day-to-day security of their families, has little need for overt invasions of other apparently protected rights. The Homeowners look to this Court to protect those rights by reminding California governments and courts of the limits of governmental power.

For these reasons, this Court should deny the Motion to Dismiss and note probable jurisdiction of this appeal.

Respectfully submitted,

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May 1, 1986

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 1, 1986, I served the within Appellants Reply Brief in re: "Whalers' Village Club v. California Coastal Commission" in the United States Supreme Court, October Term 1985, No. 85-1606;

on the parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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Attention:
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All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on May 1, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA